NO. 90-651

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

MICHAEL E. PLUNKETT , PETITIONER

AND

LANE + KNORR + PLUNKETT, ARCHITECTS AND PLANNERS; LANE + KNORR + PLUNKETT, INVESTMENT COMPANY, A/K/A/ LKP INVESTMENT COMPANY,

PLAINTIFFS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, RECEIVER OF FIRST INTERSTATE BANK OF ALASKA; FIRST INTERSTATE BANCORPORATION; FIRST INTERSTATE BANK OF OREGON,

RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CONDITIONAL PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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DECEMBER 21, 1990.

EDITOR'S NOTE:

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No. 90-651

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

MICHAEL E. PLUNKETT, Petitioner

LANE + KNORR + PLUNKETT ARCHITECTS AND PLANNERS: LANE + KNORR + PLUNKETT INVESTMENT COMPANY, a/k/a LKP INVESTMENT COMPANY,

Plaintiffs,

V.

FEDERAL DEPOSIT INSURANCE CORPORATION, As Receiver of First Interstate Bank of Alaska; FIRST INTERSTATE BANCORPORATION, FIRST INTERSTATE BANCORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CONDITIONAL PETITION FOR REHEARING

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CONDITIONAL PETITION FOR REHEARING

Petitioner moves this Court for an order (1) vacating its denial of the Petition for Writ of Certiorari, and (2) granting the Petition for Writ of Certiorari. This Motion is conditioned on Court's denial in whole or in part of Petitioner's Motion to Vacate Order Denying Petition for Writ of Certiorari for Procedural Error ("MV").

Reasons for Granting Rehearing

A. Intervening Circumstances of a Substantial or Controlling Effect.

1. Court Made a Prejudicial Procedural Error in Distributing the Petition Before It Was Ripe, Thus Denying Petitioner a Meaningful Opportunity to File a Reply Brief

Court received Solicitor General Waiver November 6, 1990. (Supreme Court Record "SCR" 3). Court erroneously distributed Petition Nov. 7, 1990. SCR 4, prior to the time for filing Opposition brief by Respondents . SCR 4. Court denied Petition Nov. 26, 1990. SCR 6. Said

premature distribution is in violation of Rule 15.5. Such egregious error denied Petitioner procedural due process of law in that time to submit a meaningful Reply Brief to Opposition Brief of FIBO and FIBC of November 15, 1990 was denied. Said error was prejudicial in that the Reply Brief was necessary to point out,

". . .misstatements of fact or law set forth in the (Opposition) which have a bearing on the question of what issues would properly be before the court if certiorari were granted. Rule 15.1 "

Those misstatments are detailed in MV. FIBC/FIBO principal errors were (1) stating only evidence before the court were affidavits included in Opposition Brief Appendices when verified complaint, proposed amended complaint and affidavits included in Appendix to Petition("AP") were also before the District Court who ignored same in ruling

" FIBO and Interstate of Alaska had no relationship whatsoever at the time the loans were made." FIBO Opposition, App.

B-4. (A statement parroted from FIBO/FIBC)

(2) Errored in stating

"petitioner failed to sustain his burden showing <u>any nexus whatever</u> between FIBC and FIBO and the loans made to petitioner by the Alaska Bank."

FIBO Op. Brief ("OB") at 20. Petitoner had submitted evidence of participation loan program between FIBO and Alaska Bank of Commerce ("ABC") later First Interstate Bank of Alaska ("FIBA") now FDIC as receiver. OB App. J-3.

(3) Errored in stating

"the evidence at summary judgment showed that the Alaska bank <u>unilaterally</u> referenced the Oregon bank's prime rate, for purposes of convenience. . . "

OB at 21, when Homan Affidavit , OB App. J-3, described the pegging as being part of the loan participation program.

(4) Errored in stating,

Because all of petitioner's remaining federal and state claims relied upon showing of connection between FIBC or FIBO and the loans made to petitioner,"

OB at 21, when in fact verified Complaint (App.1 to MV) and Revised Second

Amended Complaint ("RSAC"),(App.2 to MV) made claims for FIBO misrepresentation of interest rate in telephone calls, RICO claims,Alaska Consumer Protection statute, AS 45.50.471 et sec. based on independant torts and wrongs of FIBO/FIBC.

(5) errored in interpreteting United Mineworkers v. Gibbs,383 U.S. 715,726, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966)was authority to dismiss pendant and ancillary claims with prejudice when they had not been tried, and (6) that Arizona v. Cook Paint and Varnish Co., 541 F.2d 226,227-28 (9th Cir. 1976), per curium, cert den. 430 U.S. 915, 97 S.Ct. 1327, 51 L.Ed. 2d 593 (1977), a claim which upheld dismissal with prejudice of pendant claims decided at trial before dismissal of federal claims was applicable to dismissal of pendant and ancillary claims against FIBO and FIBC and impliedly FDIC.OB at 22.

Lack of reply brief also prejudiced

pro se Petitioner ability to counter Opposition Brief's reliance on false conclusion of Appellate Court that

" Since all of his (Petitioner's) claims, both state and federal, are based on an allegation of conspiracy, the district court rendered summary judgment against all of them."

Neither the attorney drafted Complaint nor the RSAC based said claims on said conspiracy allegation. Even if the RSAC could be so construed, pro se pleadings are held to less stringent standard, Haines v. Kerner, 404 U.S. 519,520-21, 30 L.Ed.2d 652, 92 S.Ct. 594 (1972), and Petitioner is entitled to amend to correct deficiency. Noll v. Carlson, 809 F.2d 1446-1449 (C.A.9,1987).

2. Any Justice with Interests in, or Obligations to First Interstate Bancorp or Affiliates Failed to Recuse Themselves

In reviewing U.S. Supreme Court Bulletin Petitoner found biographies of Justices Id. at 14-15 wherein Justice O'Conner is listed as a board member of

First National Bank of Arizona, 1971-1974, and director of Lazy B Cattle Co., 1958 to date. These directorships are not included in American Bench, 1987/1988 page 59. On May 14, 1975 Southern Arizona Bank & Trust Co., subsidiary of Western Bancorporation, now Respondent First Interstate Bancorp, merged into First National Bank of Arizona through an exchange of stock. Moody's Bank and Financial Manual, 1990, page 1606. In May 1981, First National Bank of Arizona was consolidated into Western Bancorporation with stockholders receiving latter's stock. Id. Dun's Million Dollar Directory, 1988, p. 2963 lists Lazy B Cattle Company without bank reference, no directors other than its president and director Donald Mason.

A Justice must avoid even the appearance of impropriety. Code of Judicial Conduct, Justices with an ownership in a company before the court,

and by parity of reasoning, indebted to a party before the court, must recuse themselves, 28 USC 455, in any proceeding in which their impartiality might reasonably be questioned. Further, as Justice for the 9th Circuit, Justice O'Conner has made two trips to Anchorage, Alaska, one reported at 9th Circuit Judicial Conference 132 FRD 83,85, 95, (1990), the other in 1988, in which Justice O'Conner made a speech introduced by Judge Karen Hunt of the Anchorage Superior Court, judge in related case 3An-83-4318 Civil. Matters concerning case may have been disclosed, mandating disqualification per 28 USC 455 (b)(1).

Justice O'Conner is the Justice for the 9th Circuit, and as "cert pools" have existed, See Woodard, Armstrong., The Brethren, Avon, 1981, page 322-323, and as the synopsis of issues presented for review in United States Law Week,

11/20/90, 59 LW 3375, parroted Respondent's Issues, it follows any "cert pool" summary was prejudicial to Petitioner, to the extent violation of 28 Should any Justice be disqualified, Rehearing is mandated on due process grounds.

3. 28 USC 1441(c) Has Been Changed in Such a Manner As Denial of Petition Is Prejudicial and Manifestly Unjust App. 12

Judicial Improvements Act of 1990, P.L. 101-650 amended 28 U.S.C. 1441(c), Congressional Record, October 27, 1990, S-17904, 17912. The purpose of the Act, 17 Federal Rules Service Current Material Highlights 3rd, Release 3, pages 8-9, November, 1990, is to alleviate problems of cost and delay in civil litigation.. The 28 USC 1441(c) amendment, App. 12 , intends to allow Federal Courts to remand all matters in which state law predominates, thus making a stronger case than United Mine Workers v. Gibbs, that

upon dismissal of federal issues, state issues should be dismissed for refiling in state court. With this Congressional change since Petition was filed, it would be manifestly injust to deny Petitioner's Petition for Rehearing based on Petitioner's failure to formally file an Opposition to FDIC Motion . Pendant claims against FDIC and FIBO were, given the statuatory change, improperly granted summary judgment on the fallacious grounds that all such claims hinged on the allegation of conspiracy, a false analysis.

4. Federal Rule of Civil Procedure 56 Is Being Revised, and Has Been Forwarded to Standing Committee since Petition Was Denied.

The Advisory Committee on the Federal Rule of Civil Procedure has proposed a new Rule 56 which incorporates the de facto standard changes of Anderson v. Liberty Lobby Inc., 477 U.S. 242, 106 S.Ct. 2505, 2511, 91 L.Ed. 2d 202 (1986), Celotex

Corp. v. Catrett, 477 U.S.317,106 S.Ct. 2548,2552-53, 91 S.L.Ed.2d 265 (1986), and Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). It would be unjust to deny Pro se Petitioner opportunity to amend summary judgment evidentiary materials to meet the revised standard solely because he fell within the window of time subsequent to the decisions changing the rule and the promulgation of the rule revision. Said change is a method of informing non-prisoner pro se litigants of the evidentiary standard they must meet to resist summary judgment. Jacobsen v. Filler, 790 F.2d 1362, 64-66 (C.A.9 1986). March 1989 Advisory Committee Amendment to Rule 84 even proposed adding Practice Manual. App. 13.

It is undisputed the three 1986 cases

> "taken together effected major changes in summary judgment doctrine and practice".

Jeffrey W. Stempel, A Distorted Mirror, The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict and the Adjudication Process , 49 Ohio State Law. Journal, 96,99 (1988).

" In essence the Court amended rule 56 to replace the words 'genuine issue of material fact' with words akin to ' facts presented by the nonmovant of sufficient weight to convince the trial judge that he or she would not grant a directed verdict for the movant at trial." Id. at 181.

The Advisory Committee Amendments to Federal Rules of Civil Procedure, 27, (July 1987) demonstrated this profound change effected by the cases in its proposed Rules 56 and 40, App. 8 hereto.

Advisory Committee published an even more drastic Rule Change, App. 9, September 1989 with hearings held in February 1990. In November, subsequent to Filing Petition for Writ, a Rule 56, Rule 16(d) change was approved by Advisory Committee for forwarding to Standing Committee. App. 14 hereto. Said Draft

limits summary judgment based on law or facts not of substantial controversy, requires as a condition precedent non-moving party reasonable opportunity to discover relevent evidence not under their control, lists extremely specific require ments for movant and nonmovant, requiring citations to particular pages, attachment of documentary and other evidence to briefs, defines condition where an asserted fact is without controversy, mandates the court is not obligated to consider evidentiary materials not called to its attention, allows opponent to motion opportunity to make offer of proof where it is shown materials cannot be had, prescribes penalties for materials preented in violation of Rule 11. Ap. ___

As to FDIC summary judgment, new Rule does not require a response. Advisory Committee Notes, 11/90, page 56-8, however specific peril is outlined for failure to

do so. Notes also describe methods by which documentary evidence may be submitted. Rule 56 will be forwarded to Standing Committee. (Conversation with Ann Gardiner, 12/17/90, Office of U.S. Courts Administration). Advisory Committee Reporter Paul Carrington (49 O.St. L.J. at 183, n. 423) stated Rule 56 "standards" of Anderson, Celotex, and Matsushita, are not changed. (Conversation 12/17/90).

Thus it is inequitable and manifiestly unjust to hold a non-prisoner pro se litigant to an evidentiary standard effectuated by Court decisions, not reflected in subsequent rule change until after Petition for Writ is denied.

6. Documentation of Essential Elements of Pendant Claim for Misrepresentation Have Changed Since Petition was Researched.

Petitioner reviewed Alaska Pattern Jury Instructions at Los Angeles County Law Library. Article XVII had been replaced sometime after receipt September

19,1990, yet the promulgation letter was dated July 1988, and revision to the instructions was "revised 1987". App. 10 hereto. It is unjust to hold petitioner to a more stringent burden of proof, in light of the revised elements outlined. Petitioner had no reason to question the old elements as neither FIBO nor FDIC questioned said elements.

As a result of this changed evidentiary standard, and more importantly lack of reasonable access to same by pro se litigant, petitioner has been denied substantive due process,. Certiorari must be granted to allow Petitoner to demonstrate facts exist to prove essential elements of new misrepresentation standards. New pattern Jury Instructions are included in App. 11.

7. New Evidence Demonstrates the Increased Magnitude of the Interest Rate Overcharge and Interest Rate Misrepresentation by FIBC and its Subsidiaries

The magnitude of the injuries to the Petitioner is enormous, exceeding $50 million including compensatory, consequential, punititve, triple damages, special damages, and pre judgment interest. To the class, the injury is astronomical. Only on review of the Responent's list of parties did Petitioner know for the first time the enormous array of First Interstate second tier subsidiaries. Moody's Bank and Financial Manual, 1990, page 1606 et seq. only lists first tier subsidiaries. Prime rate misrepresentation cases against FIBC and/or its subsidiaries is enormous, as are number of prime rate fixing RICO cases. See Burke, Civil RICO and Interest Rate Regulations, 39 Bus. Law Rptr., 1252, (1984), and 41 Washington Financial Rptr., 12/19/83 at 933. See Mars Steel v. Continental Illinois National Bank and Trust Company of Chicago, 834 F.2d 677

(7th Cir. 1987).(Continental Illinois' London based subsidiary was purshased by FIBC in July 1984) .

B. Other Substantial Grounds not Previously Presented

The statements of fact and law by the District and Appellate Courts have resulted in the summmary judgment against Petitioner. Granting of summary judgment in favor of FIBC and FIBO was based on the false facts that Petitioner had failed to prove any relationship whatever between FIBO and ABC at the time the loans were made. OB App. B-4, and that all allegations against FIBO and FIBC were predicated on the existence of a conspiracy. OB, App. B-7. As to FDIC, summary judgment was "railroaded" contrary to Celotex, 477 U.S. at 326,91 L.Ed.2d at 276,(see also Pocahontas Supreme Coal Co. v. Bethlehem Steel, 828 F.2d 211,214-217 (4th Cir. 1987) the Court granting summary

judgment for failure to formally submit a one sentence "Opposition to Motion" despite the record containing at that point two verified complaints and numerous Affidavits from Petitioner all proving various claims against FDIC.

At the Appellate level the manifest injustice was continued in Appellate court's false application of the abuse of discretion standard to review of granting of summary judgment as to pendant and ancillary claims against FIBC,FIBO and FDIC in lieu of de novo review, and the perpetuation of the erroneous finding that " Since all of his claims, both state and federal, are based on an allegation of conspiracy."

Court errored in holding Development Co. v. First Interstate Bank of Oregon, 815 F.2d 522 as to the antitrust action, when the factual scenario is different. Wilcox cases did not involve loan documents with

the misrepresented definition of the prime rate on the face of the note emanating from a participation agreement between FIBO and another bank. The Appellate Court should have cited Michaels Building Co. v. Ameritrust Co., 848 F.2d 674 676,n.2, (6th Cir. 1988) which was based on Dictionary definitions of prime rate as a term of art meaning "minimum and "lowest", and was factually more akin to the instant case since the prime rate was defined on the face of the note. Id . Similarly, since Petitioner provided proof a meeting of the minds existed to fix the rate of interest charged on participation loans, said prime rate being a falsely defined rate,the effect was to fix interest rate at noncompetitive levels, to surpress price competition, and to deny Petitioner opportunity to obtain loans in a competitive market, thus forcing Petitioner to pay higher interest then

under natural conditions of competiton. Petitioner therefore offered sufficient proof to raise a genuine issue of fact for trial based on the elements cited in the Michaels case, 848 F.2d 674,681 (6th Cir. 1988)..This case was cited in Supplemental Authorities, 5/10/90, MV App. 3. See Affidavits of Plunkett, Homan, Verified Complaints.at As to RICO, Appellate court relied on no authority whatsoever, rather than the several cases citied in MV App.3,) Appellant's Supplemental Authorities, and in Burke's Civil RICO and Interest Rate Regulations, 39 Business Law Reporter, 1252, 1259-61 (1984). Said clearly erroneous statements of fact and law in Appellate Memorandum Decision amount to substantive denial of due process, particularly when the Appellate Court did not even address many of petitioner's argued Points on Appeal , even in a footnote, such as denial of

motion to amend, etc.

Where the proof is largely in the hands of the anti-trust conspirators, Poller v. Columbia Broadcasting, 368 U.S. 464, 473, 82 S.Ct. 486, 491, 7L.Ed.2d 458 (1962) dismissals prior to ample opportunity for discovery should be sparingly granted. Hospital Building Company v. Trustees of Rex Hospital, 425 U.S. 738, 746, 96 S.Ct. 1848, 1853, 48 L.Ed. 2d 338 (1976). methods used by FIBC, FIBO, and FIBA in their loan participation program and "count of four" methods are no different thatn the Rule of Reason standard applied in price fixing of National Society of Professional Engineers v. U.S., 435 U.S. 679, 55 L.Ed. 2d 637, 98 S.Ct. 1355 (1978). An understanding knowingly made, between competitiors to follow any pricing formula which will result in raising or maintaining prices charged constitutes price fixing in

violation of 15 U.S. C. 1 et seq. See Del Rio Distributing, Inc. v. Adolph Coors Co., 589 F.2d 176 (5th Cir. 1979), rehearing den. 444 U.S.840, 100 S.Ct. 80,62 L.Ed. 2d 52 (1979).

Conclusion

For any one of the above reasons, or more importantly, as a result of all the above items taken together, petition for Rehearing must be granted, Order denying certiorari must be vacated and certiorari granted.

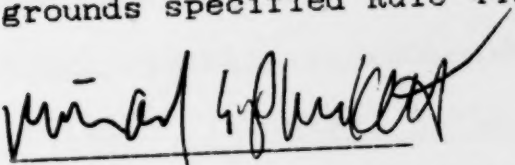
Dated at Manhattan Beach, California this 21st day of December, 1990.

Michael E. Plunkett, Pro se, Petitioner, on his own behalf and on behalf of his partnership interests in Lane + Knorr + Plunkett Architects and Planners and Lane + Knorr + Plunkett Investment Company.
331 8th Street, Manhattan Beach, Calif. 90266. (213) 379-9848

Certification

I hereby certify that this petition for rehearing is presented in good faith and

not for delay and is restricted to the grounds specified Rule 44.1 and 44.2.



Michael E. Plunkett, Petitioner

56(a). On motion the court shall render judgment with respect to any claim, counterclaim, or cross claim, if it finds that the moving party is entitled to judgment as a matter of law on established facts. In rendering judgment, the court shall establish the law and the material facts in conformity with Rule 40. Id at 66-69.

40(b) . . .the court may. . . establish facts on which the final decision on a claim, counterclaim or defense may depend. A fact may be established by the court only if there is no evidentiary basis on which the fact might be rejected by a reasonable trier of fact. Id at 38-39.

2

PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE AND THE FEDERAL RULES OF CIVIL PROCEDURE

NOTICE

Public hearings on proposed amendments to the Civil Rules will be held on January 8, 1990 in San Francisco, California and on February 2, 1990, in Chicago, Illinois

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

OF THE

JUDICIAL CONFERENCE OF THE UNITED STATES.

SEPTEMBER 1989

APPENDIX 9

RULE 16. PRETRIAL CONFERENCES; SCHEDULING; MANAGEMENT

(In Part)

In addition, in order to avoid unnecessary costs of trial, the court may consider whether on its own initiative with adequate notice

(14) facts or law should be summarily estableished pursuant to Rule 56(a) to define the issues remaining for trial; or

(15) summary judgment should be entered pursuant to Rule 56 (b) with rspect to any pending claim, counterclaim, or cross claim.

RULE 56. SUMMARY ESTABLISHMENT OF FACT AND LAW; SUMMARY JUDGMENT

Summary Establishment of Fact or Law.

(1) When the court on motion or at a pretrial conference conducted under Rule 16(d) determines that expedition and economy may be thereby achieved, it may

pursuant to this subdivision summarily extablish as a matter of law any facts that are not genuinely controverted or it may establish law to control further proceedings in an action. In establishing facts, the court need consider only those material satisfying the requirements of subdivision (c) of this rule that are brought to the court's attention by the parties.

(2) A motion to establish fact shall be accompanied by a memorandum containing (A) authority for the law controlling the action; (B) copies of any materials satisfying the requirements of subdivision (c) that reveal evidence that will be available for trial to prove the fact to be established and that cannot be genuinely contested; and (C) reference to any absence of probative evidence enabling an opposing party to satisfy a burden of

producing evidence or p.roof. A motion to establish law shall be accompanied by a memorandum containing the authority for the law controlling the action.

(3) A paqrty opposed to the summary establishment of the specified facts or law shall be allowed a reasonable time (30 days unless the court otherwise orders) to prepaqre an opposing memorandum which shall also be supported by reference to any relevent material available to the opponent that meets the requirements of subdivision (c)

(4) A fact may be summarily established only if any party opposing the order has had opportunity for discovery as provided in subdivision (d) of this rule but has not indicated in the opposing memorandum an evidentiary basis on which a reasonable trier of fact could find for the opposing party with respect to that

fact. When a motion for a summary establishment of fact is made and supported as provided in paqragraph (a)(2) of this rule, an opposing party may not rest upon the mere allegations or denials of the opposing party's pleading, but the opposing party's response by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

(5) An order of establishment shall be entered reciting the fact or law established and the basis therefor.

Summary Judgment; Motion.

(1) If upon the basis of facts stipulated or summarily established or establishable as a matter of law, the court determines that there is no material fact genuinely in dispute and that a party is therefore entitled to judgement as a matter of law, the court may upon motion or at a pretrial

conference enter judgment for that party with respect to a claim, counterclaim, cross-claim, or third party claim.

(2)(A) A motion for summary judgment shall specify the judgment sought, and the law and the established or establishable facts on which the moving party is entitled to judgment.

(B) A party opposing a motion for summary judgment shall be allowed 30 days in which to file and serve a memorandum accompanied by any supporting material, and specifying those issues on which such a party intends to present evidence at trial if held. The opposing party may also make a cross-motion. If the opposing party makes such a response, the moving party shall be allowed 10 days for reply before any ruling on the motion or cross-motion is made. For good cause stated, the court may with notice shorten

or extend the times for response and reply.

Materials Used to Support or Oppose Summary Establishment of Fact.

(1) To support or oppose a motion for summary establishment of fact, a party may, subject to the provisions of this subdivision, rely upon a pleading or other admission of the fact by the opposing party or affidavits, depositions, answers to interrogatories, documents, or items of physical evidence that are admissible to prove or disprove the fact to be established or that confirm the availability of such evidence. Where only a portion of any such material is relevant to the fact to be established, only that portion shall accompany the motion or memorandum in support of or opposition to the motion.

(2) An affidavit or declaration under

penalty perjury signed in the form authorized by 28 U.S.C. paragraph 1746 may be considered in ruling on a summary establishment of fact only if it is made on personal knowledge, sets forth such facts as would be admissible inevidend, and shows affirmatively that the affiant is competent to testify to the matters stated therein.

(3) If facts referred to in an affidavit or declaration are contained in another document, a copy of the document or the relevent excerpt shall be attached and the affidavit or declaration shall contain a speific reference to the document and the location therein where the excerpt can be found. Voluminous documents need not be attached to the affidavit or declaration and may be presented in the form of a verified chart, summary or calculation, provided that such

documents are available for review by the parties and the court.

Opportunity for Discovery. No Summary judgment shall be rendered with respect to any claim, counterclaim, cross-claim, or third party claim, nor shall any fact be summarily established, until any opposing parties have had a reasonable time to discover evidence bearing on any fact sought to be established.

(g-e) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shallforthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable

attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

With respect to a motion to establish facts, the requirements that the moving party specify the evidentary basis on which the fact could be established is a more stringent requirement than is expressed in the former subdivisions. (a) and (b). Cf. Celotex Corp. v. Catrett, 106 S. Ct. 2548, 2552 (1986).

Alaska Court System

State of Alaska
Office of Adminsitrative Director

303 K Street
Anchorage, Alaska 99501

July 1, 1988

William T. Cotton
Court Rules Attorney

Instructions for Updating the Alaska Civil Pattern Jury Instructions

Revisions to several articles of the Alaska Civil Pattern Jury Instructions are attached. These revisions were completed by the Civil Pattern Jury Instruction Committees. The remainder of the articles will be reviewed, and revised instructions issued, in the next several years. Instructions for supplementing the prior volume of jury instructions follow:

1. Articles 3 (Negligence); 5 (Motor Vehicle and Highway Safety); 6 (Owners and Occupiers of Land); 7 (Products

APPENDIX 10

Liability); 8 (Professional Malpractice); 12 (Assult and Battery); 15 (False Imprisonment and False Arrest); 17 (Misrepresentation, Fraud and Non-disclosure).

Throw away all existing instructions for these articles and replace with the attached instructions for these articles and replace with the attached instructions. Do not discard other articles.

2. Article 20 (Damages).

Do not throw away all existing instructions. Discard only existing instructions 20.05, 20.07, 20.08, and 20.20. Then add the attached revised instructions in the appropriate places. (Note: The damages instructions review has not been completed. Revised instructions are solely aimed at making changes made necessary by "tort reform" legislation.);

APPENDIX 10

17.01 MISREPRESENTATION

Plaintiff claims that (he/she) was damaged because defendant misrepresented certain information. In Order to win on this claim, the plaintiff must establish it is more likely true than not true that:

1. The defendant made a false or misleading representation, either orally, in writing or by conduct; and

2. The defendant's false or misleading statement was susceptible of knowledge at the time made; and

3. The defendant's false or misleading statement was material. A material statement is one that could be reasonably expected to influence a person's judgment or conduct concerning the transaction in question; and

4. The plaintiff actually relied on the defendant's false or misleading statement; and

5. The plaintiff's reliance on the false or misleading statement was justifiable. A buyer's reliance on a seller's material representation is justifiable, even if imprudent, or exhibiting poor judgment, unless the buyer's conduct is wholly irrational, preposterous, or in bad faith; and

6. That as a result of (his/her) reliance, plaintiff has suffered some damage or injury; and

7. That when the defendant made the false or misleading statements, (he/she) either was aware that the statement was false or misleading or a reasonably careful person under similar circumstances would have been aware that the statement was false or misleading.

If you decide that it is more likely true than not true that each of these things appened, then your verdict must be

for the plaintiff. Otherwise, as to this claim, you must find for the defendant.

Use Note

Bevins imposed liablity for innocent misrepresentation upon real estate agents and brokers for specific policy reasons. Cousineau and Foster allow recovery for innocent misrepresentation in the real estate case. Beyond these arguments may be raised concerning the lack of public policy or the lack of precedence. Paragraph 7 should be included only if innocent misrepresentation is not a claim by plaintiff in the case.

If the case involves nondisclosure, then 17.02 must be given.

17.02 NONDISCLOSURE

Plaintiff claims that (he/she) was damaged because defendant failed to disclose certain information. In order to win on this claim, the plaintiff must establish that it is more likely true than not true that:

1. The defendant failed to disclose information to plaintiff; and

2. The defendant had a duty to disclose the information to the plaintiff.

I will explain when defendant has such a duty to disclose in a moment; and

3. The information not disclosed was susceptible of knowledge at the time the transaction was made; and

4. The information not disclosed was material. Material information is information which, if disclosed, would be reasonably expected to influence a person's judgment or conduct concerning the transaction in question; and

5. The plaintiff actually formed and relied upon a false or misleading understanding created by defendant's non-disclosure; and

6. The plaintiff's reliance on (his/her) false or misleading understanding was justifiable. A plaintiff's reliance on a false or misleading understanding created by a

seller's nondisclosure is justifiable even if imprudent or exhibiting poor judgment for a person or plaintiff's background and experience unless the plaintiff's conduct in failing to discover the nondisclosure was wholly irrational, preposterous or in bad faith; and

7. As a result of (his/her) reliance, plaintiff has suffered some damage or injury ; and

8. That when the defendant failed to disclose the information (his/her) either was aware of the information not disclosed or a reasonably careful lpoderson under similar circumstance would have been aware of the information not disclosed.]

Use Note

Refer to the first paragraph in the use note to instruction 17.01 as to whether paragraph 8 of this instruction should be given.

Instruction 17.03 must be given immediately following this instruction.

APPENDIX 11

17.03 DUTY TO DISCLOSE INFORMATION

Defendant had a duty to disclose information to the plaintiff if you find that it is more likely true than not true that:

1. The defendant failed to disclose information which made the defendants statements misleading; or

2. The defendant had previously innocently made a false or misleading statement which was not susceptible to knowledge at the time made, but which the defendant later discovered or reasonably should have discovered was false or misleading; or

3. There existed between plaintiff and defendant.

a. a contractual relationship obligating the defendant to disclose information as part of the obligation to deal in good faith; or

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b. a relationship that imposed on defendant as a professional person, a duty to disclose information accurately because the defendant was in the business of providing such information; or

c. such other relationship whereby plaintiff had placed trust and confidence in defendant.

d. a relationship of <u>(insert applicable fiduciary relationship).</u>

<u>Use Note</u>

This instruction should follow 17.02. The language in paragraph 3 of this instruction should be changed to fit the particular circumstances of each case.

The Alaska Supreme Court has held that some relationships are fiduciary and hence involve a duty to disclose information.

Real estate agent and broker.

<u>Veach v. Myers Real Estate, Inc.,</u>
599 P. 2d 746 and
<u>Black v. Dahl,</u> 625 P. 2d 876

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Attorney.

Greater Area, Inv. v. Bookman 657 P.2d 828 and

Miller v. Sears, 636 P.2d 1183

Bookkeeper.

Paslay v. Barber, 368 P.2d 549

Corporate Shareholder.

Knabel v. Heiner, 645 P.2d 20a1, 663 P.2d 55a and 673 P.2d 805

Financial Consultant.

Orsini v. Bratten, 713 P.2d 791 (1986)

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Para. 1441. Actions removable generally

(c) Whenever a separate and independent claim or cause of action, ...1990 within jurisdiction confirmed by section 1331 of this title is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or in its discretion, may remand all matters in with state law predominantly.

(June 25, 1948, ch 646, para. 1, 62 Stat. 937; Oct. 21, 1976, P.L 94-583, para. 6, 90 Stat. 2898; June 19, 1986, P.L. 99-336 para. 3(a), 100 Stat. 637, P.L. 101-650; Oct. 27, 1990.

APPENDIX 12

COMMITTEE ON RULES OF PRACTICE
AND PROCEDURE.

OF THE

JUDICIAL CONFERENCE OF THE
UNITED STATES,

PRELIMINARY DRAFT OF PROPOSED AMENDMENT TO
RULE 84 OF THE
FEDERAL RULES OF CIVIL PROCEDURE*

Rule 84. Practice Manual

The Practice Manual consist of administrative rules and forms and is set forth as an Appendix to these rules. The forms and rules contained in the Practice Manual are sufficient under these rules and any local district court rules and are intended to indicate the simplicity and brevity of statement that these rules contemplate. The Practice Manual may be amended from time to time by the Judicial Conference of the United States on recommendation of the Committee on Rules of Practice and Procedure arrived at after notice and comment.

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Rule 56. Summary Judgment

(b) Facts Not In Substantial Controversy. A fact is not in substantial controversy if it is stipulated or admited by the parties who may be adversely affected thereby or if, considering the relevant admissible evidence shown to be available for presentation at a trial (or the lack thereof) and the burden of production or persuasion and standards applicable thereto, a party would be entitled at trial to judgment as a matter of law with respect thereto under Rule 50.

(c) Motion and Proceedings Thereon. A party may move for summary judgment at any time provided the other parties to be affected thereby have made an appearance in the case and have been afforded a reasonable opportunity to discover relevant evidence pertinent thereto that is not in their possession or under their

control. Within 28 days thereafter any other party may serve and file a resonse thereto, except that such response shall be filed within 14 days if the party has stipulated of admitted the facts asserted to be without substantial controversy.

(1) Without argument, the motion shall (A) describe the claims or issues as to which summary judgment should be granted, specifying the judgment sought; (B) briefly state the principles of law relied upon; and (C) recite in separately numbered paragraphs the specific facts asserted to be without substantial controversy and on the basis of which summary judgment should be granted, citing the particular paqges or paragraphs of stipulations, admissions, interrogatory answers, depositions, documents, affidavits, or other materials supporting those assertions.

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(2) Without argument, a response shall (A) state the extent, if any, to which the party agrees that summary judgment should be granted, specifying with respect thereto the judgment that should be entered; (B) briefly state the principles of law relied upon: (C) indicate the extent to which the asserted facts recited in the motion are claimed to be false or in substantial controversy, citing the particular pages or paragraphs of any stipulations, admissions, interrogatory answers, depositions, documents, affidavits, or other materials supporting the contention; and (D) recite in separately numbered paragraphs any additional facts (whether or not asserted to be without substantial controversy) which preclude summary judgment, citing the materials evidencing such facts. To the extent a party fails to timely

indicate and demonstrate under clause (C) that an asserted fact is false or in substantial controversy, it shall be deemed to have admitted such fact.

(3) If a motion for summary judgment or response thereto is based to any extent on depositions, answers to interrogatories, documentary evidence, or affidavits that have not been previously filed, the party shall append to its motion or response the pertinent portions of such materials. Only with leave of court may a party moving for summary judgment supplement its supporting materials.

(4) Argument supporting a party's contentions as to the controlling law or the evidence respecting asserted facts shall be submitted by a separate memorandum at the time the party files its motion for summary judgment or response

thereto and at such other times as the court may permit.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court may make an order specifying facts that are without substantial controversy or the controlling law, including the extent to which liability or the amount of damages or other relief is not an issue for trial, and directing such further porceedings in the action as are just. Upon the trial of the action the facts and law so specified shall be deemed established, and the trial shall be conducted accordingly. An order that does not adjudicate all claims with respect to all parties may be entered as a final judgment to the extent pdermitted by Rule 54(b).

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(e) Matters to be Considered. In determining whether an asserted fact is without substantial controversy, the court shall consider stipulations, admissions, and to the extent on file, the following: (1) depositions, answers to interrogatories, and affidavits to the extent such evidence would be admissible if the deponent, person answering the interrogatory, or affiant were testifying at trial, provided however that an affidavit must affirmatively show that the affiant would be competent to testify to the matters stated therein; and (2) documentary evidence to the extent such evidence would, if authenticated and shown to be an accurate copy of original documents, be admissible at trial in the light of other evidence. A party may rely upon its own pleadings only to the extent

of allegations therein that are admitted by other parties. Notwithstanding the foregoing, the court shall not be required to consider evidentiary materials not called to its attention pursuant to paragraphs (1) or (2) of subdivision (c).

(f) When Evidence Unavailable. Should it appear from the affidavits of a party opposing a motion for summary judgment that the party cannot for good cause shown present materials needed to suppport that opposition, the court may deny the motion, may permit an offer of proof, may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Powers of Court.

(1) The court (A) may specify the period during which motions for summary judgment may be filed with respect to

particular claims or issues; (B) may enlarge or shorten the time for responding to motions for summary judgment, after considering the opportunity for discovery and the time reasonably needed to obtain or submit pertinent materials; (C) may on its own initiative direct the parties to show cause within a reasonable period why specified facts should not be treated as without substantial controversy and summary judgment based thereon granted; and (D) may conduct a hearing to consider further arguments, rule on the admissiblity of evidence or receive oral testimony to clarify whether an asserted fact is in substantial controversy.

(2) Should it appear to the satisfaction of the court at any time that any motion, response, memorandum or supporting materials presented pursuant to this rule are presented in violation of

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Rule 11. the court shall forthwith order the party presenting such materials to pay to the other parties the amount of the reasonable expenses which the filing of the materials caused the other parties to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

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